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The Law and Lawyers of Sir Walter Scott

An Address Delivered to The Law Association
of Philadelphia on March 6, 1906

BY

JOHN MARSHALL GEST
of the Philadelphia Bar

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905 Lafayette Bldg., Phila., Pa.

June 26th, 1911.

Robert D. Dripps, Esq.,

West End Trust Bldg., Phila., Pa.

My dear Mr. Dripps:-

I am very much pleased to receive your kind letter of the 22nd inst., and especially to hear you say that the younger lawyers approve of my appointment. I hope that my new duties will bring me into closer contact with you and the other members of the Junior Bar, and remain, with kindest personal regards,

Yours very sincerely

John Marshall Geer



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THE LAW AND LAWYERS OF SIR WALTER SCOTT.

"If it isna weel bobbit
We'll bob it again."

Walter Scott occupies a unique position in literature. His fame rests on his poems and novels, but he was also an historian, an antiquarian, a lawyer, a judge and a clerk of the highest Court in Scotland. No less a man than Emerson said that Scott, in the number and variety of his characters, approached Shakespeare, and Scott's flatterers were fond of making a closer comparison, but Scott, himself, with the natural modesty of a Scotchman, and the true self appreciation of a genius, said he was not fit to tie Shakespeare's brogues. He surely could not have written *Hamlet*, nor indeed could he have written *Rabbi ben Ezra*, nor yet, *In Memoriam*; but the *Lady of the Lake*, *Marmion* and the *Lay of the Last Minstrel*, with their smooth verse and charming ballads, have never been equalled. His novels are wonderful. No writer has produced so much that is so uniformly good. He hits the gold every time. Stevenson, no mean critic, called him, "out and away the king of the Romantics" and "the best of novelists," but maintains that Scott was wrong in his history, and picks the *Lady of the Lake* and *Guy Mannering* to tatters, for their "bad English, bad style, and abominably bad narrative." Macaulay, on the other hand, was amazed by Scott's skilful use of history in his novels. "Scott has used," says Macaulay, "those fragments of truth which historians have scornfully thrown behind them, in a manner which may well excite their envy. He has constructed out of their gleanings works which, considered as histories, are scarcely less valuable than theirs."—yet

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Macaulay adds with his usual snarl, "there are in *Waverley* and *Marmion* Scotticisms at which a London apprentice would laugh." This London apprentice doubtless is elder brother to Macaulay's celebrated school boy; but Walter Scott, when Lockhart kindly pointed out some little slips, merely said, "I never learned grammar." De Quincey alleged that Scott utterly failed in depicting the English peasantry, nor would this be surprising for Scott never lived among them, and so, according to other critics he has not been absolutely correct in reproducing the colloquial Scotch of the Highlands.

We can afford to pass over his slips in grammar, his errors in style, his occasional mistakes in history for the sake of the vivid humorous narrative and stirring verse. But vivid and stirring as they are, there is not a visible trace in the whole series that their author was conscious (though Stevenson says all Scots are thus conscious) of the fragility and unreality of that scene in which we all play our uncomprehended parts. He looked at this strange world so infinitely pathetic, so irresistibly comic as substantial and necessary. No doubt of its reality ever entered his mind.

As Taine said, Scott paused on the threshold of the soul. Carlyle said there was nothing spiritual in him; the Mystery of Existence (with capitals) was not great to him. He quietly acquiesced and made himself at home in a world of conventionalities. But, as Carlyle graciously concludes, "when he departed he took a Man's life along with him"—which upon the whole is not very remarkable.

As Scott took the world as he found it, so we must take Scott as we find him, and acknowledge what Emerson calls, "the exceptional debt which all English speaking men have gladly owed to his character and genius." He is indeed "the delight of generous boys." He who wrote that fateful tragedy, *The Bride of Lammermoor*,—"worthy of Aeschylus;" and the *Heart of Mid-Lothian*, also wrote those rattling romances, *Guy Mannering*, *Quentin Durward*, *Ivanhoe* and *The Talisman*, and who-

soever reads them, old as he may be, may become for the time a boy again.

Scott was a worshipper of the God-of-things-as-they-are, a rank Tory, a valiant Jacobite from a boy, perhaps something of a toady withal; but he was upright, modest and fair-minded, he was gentle and generous and truthful, (except in one egregious instance), good humor streamed from every pore, he was thoroughly in sympathy with everybody, including himself, he was sane, cool and courageous, he was born under a dancing star; and when that fateful day arrived of threatened insolvency, he wrote in his journal *Venit illa suprema dies* and without a whimper sat down at his desk. He wrote a volume of *Woodstock* (there were three of them) in fifteen days and said he could have done it in ten, were it not for his Court of Sessions work. The motto on his sun dial was "Work for the night is coming," and in his books he often says "To-morrow is a new day."

"The sun set, but set not his hope;
Stars rose, his faith was earlier up;
He spoke, and words more soft than rain,
Brought the Age of Gold again;
His action won such reverence sweet,
As hid all measure of thefeat."

But I have no desire to don the waxen wings of criticism or biography. The subject of this paper is the *Law and Lawyers of Scott*, and our purpose is to portray Walter Scott as a lawyer and to trace the influence of his legal training and study upon his writings. No one reading his novels and poems without this thought in mind can realize how much of their interest, learning and humor is derived from this source. It is safe to say that had not Scott been a lawyer his writings would have lost much of their characteristic flavor.

Walter Scott the son of Walter, was born August 15, 1771. He died September 21, 1832. In his fifteenth year he became an industrious apprentice in the office of his father, a Writer to the Signet, and in the little back room, underwent the toilsome, but beneficial, drudgery

of an attorney's clerk, learning, what he never forgot, the value of work,—

"That grips together the rebellious days."

He says that he disliked the monotony of the office, detested its confinement, and reviled the "dry and barren wilderness of conveyances," but he was ambitious and said of himself that when actually at the oar, no man could pull harder than he. He made his extra pocket money for books and the theatre by copying papers, and once wrote 120 folios without stopping. He then decided to adopt the advocate's profession, and from 1789 to 1792, pursued the regular course of study, including Heineccius' Analysis of the Pandects and Erskine's Institutes. The Scots law formed a complete and interesting system, dating as a whole from the institution of the Court of Session in 1532, by James V, having its composite origin in the Civil, Canon and Feudal laws, English, French and Scottish customary law, with statutory modifications, a tangled skein of many colored threads, woven into a picturesque and serviceable tartan plaid by men inferior to none in legal ability and learning, for as Scott himself said, although Heaven did not form the Caledonian for the gay world a Scotchman is a born lawyer. The Court of Session by the way was originally modelled after the Parliament of Paris and the Scottish lawyers frequently studied in Paris and Leyden.

Scott, himself, describes Scottish law as a fabric formed originally under the strictest influence of feudal principles, but renovated and altered by the change of times, habits and manners, until it resembles some ancient castle, partly entire, partly ruinous, partly dilapidated, patched and altered during the succession of ages, by a thousand additions and circumstances—a comparison reminding one of Blackstone's similar description of the common law in his third book.

Scott with his friend and fellow student, William Clerk, was called to the bar on July 11, 1792, in his 21st

year. With characteristic humor and at the same time exhibiting his fondness for the history of the law, he wrote his thesis (which apparently has never been printed) on the title, *De Cadaveribus Punitorum*, (Concerning the disposal of the dead bodies of Criminals.) Dig. xlviii, c. 24, and dedicated the same to Lord Braxfield, the "hanging judge," or, as Scott used to allude to him, "Old Braxie." He was a well-known figure on the Scottish Bench, curious stories are told of him, and he was the original of Stevenson's *Weir of Hermiston*.

In *Redgauntlet* Scott introduces himself as Alan Fairford, his father as Alexander or "Saunders" Fairford and his friend William Clerk, as Darsie Latimer, the hero of the story. In the novel old Fairford writes to a friend, as Scott senior may well have done,—“Alan has passed his private Scots law examination with good approbation—a great relief to my mind. His public trials, which are nothing in comparison, save a mere form, are to take place by order of the Honorable Dean of Faculty on Wednesday first; and on Friday he puts on the gown and gives a bit chack of dinner to his friends and acquaintances, as is the custom.” In the novel Alan’s thesis does not concern the dead bodies of criminals, but is upon the title “*De periculo et commodo rei venditae*,” and according to the story, Alan studied law to please old Fairford who regarded as the proudest of all distinctions the rank and fame of a well-employed lawyer, and would have laughed with scorn at the barren laurels of literature. Scott’s description of Alan was true of himself; “He had a warmth of heart which the study of the law and of the world could not chill, and talents which they had rendered unusually acute.”

In Scott’s first criminal case, he defended a poacher, and whispered to his client, as he heard the verdict,—not guilty—“You’re a lucky scoundrel.” “I am just of your mind,” was the reply, “and I’ll send you a hare in the morn.”

But when retained in a more important case, he was not so fortunate. The General Assembly of the Kirk

of Scotland sat in judgment in the case of a clergyman whose name was M'Naught, though it should have been M'Naughty, for he was accused of habitual drunkenness, celebrating irregular marriages, singing of profane songs and dancing with a "sweetie wife," that is a lassie who sold gingerbread, or "sweeties" at a country frolic.

On account of the personnel of the Court, Scott could not have prudently made the obvious defence that the reverend gentleman had at the most been guilty of mere *clerical errors*, so he was unfortunately obliged to defend the case upon its slender merits. As he quoted more at large from his client's convivial ditties than was agreeable to the General Assembly, one of that venerable court called him sternly to order, while his chums, who filled the gallery, encouraged him with shouts of "encore." Disconcerted by these inconsistent suggestions, Scott made somewhat of a fizzle, at any rate, Mr. M'Naughty was convicted, and his youthful advocate walked out of court feeling as we have all sometimes felt, that the whole azure canopy had suddenly shrivelled into a blackened scroll. He was greeted by his cronies with shouts of laughter, and dragged off to a neighboring tavern where they spent the evening in a High Jinks, with which the Scottish lawyers were wont to drive away dull care.

In *Guy Mannering* Scott describes a High Jinks in which Paulus Pleydell, Esq. was found taking a prominent part when Mannering and Dandie Dinmont sought him out for advice. In these merry makings dice were thrown by the company and those upon whom the lot fell, were obliged to assume certain fictitious characters or repeat verses. Forfeits were easily incurred and paid by additional rounds of drinks. Pleydell was grotesquely attired as King of the Revels. "It's him," said Dandie, astounded at the sight, "Deil o' the like o' that ever I saw." Dandie wanted to retain Pleydell in a dispute with a neighbor about a lot of land worth scarcely five shillings a year. "Confound you," said Pleydell, "why don't you take good cudgels and settle

it?" "Od, sir," answered the farmer, "we tried that three times already; but I dinna ken, we're baith gey good at single stick and it couldna weel be judged." "Then take broadswords and be d——d to you, as your fathers did before you," said the counsel learned in the law. Dandie was at first about to take the advice in earnest, and goes away in sorrow, but afterwards Pleydell takes his case. "I don't see after all," said he, "why you should not have your lawsuits too, and your feuds in the Court of Session, as well as your forefathers had their manslaughters and fire raisings."

Scott himself was no anchorite; he rather prided himself on his skill in making punch, and as he said in his Journal, he thought "an occasional jolly bout improved society," and recommended a little magnesia for the "morning after."

Later on Scott defended a young man charged with homicide and secured his acquittal. Part of his brief is given by Lockhart in Chapter vii. It is a careful and conscientious though rather labored piece of work.

It must be confessed that Scott did not score a brilliant success at the Bar, although in a letter to his fiancée in 1797, he claimed that none of his contemporaries had very far outstripped him, and on December 16, 1799, he was glad to accept the office of Sheriff or Sheriff Depute of Selkirkshire, a position which paid £250 or £300 per annum, and did not conflict with his private practice, but rather advanced it. The duties of a Scotch sheriff are, naturally, very different from those of the English official of the same name, as they resemble those of a county court Judge. Scott's jurisdiction included generally all civil actions, personal and possessory, and certain offences against the criminal law; and in addition, he returned juries and executed writs. Scott's Letters and Journal contain frequent references to his duties which he discharged in a humane and sensible manner.

He often procured a settlement of insignificant cases; as he said "there is something sickening in seeing poor devils drawn into great expenses about trifles, by inter-

ested attorneys." But he also admitted, doubtless recognizing the legal mind and litigious nature of the Scot, that too cheap access to litigation has its evils on the other hand.

In 1830, a convict attempted to escape from the Court room. Sir Walter, with sixty years on his head, leaped, game leg and all, from the Bench and stopped him with his own hand. No English Sheriff could have done more.

Even before his appointment as Sheriff, Scott was incited by the writings of Matthew Gregory Lewis, the celebrated "Monk," to try his hand at ballad writing in imitation of the German of Bürger, and soon found that the "fair fields of old romance" were ready for his cultivation. His work in ballad writing, and the Border Minstrelsy, culminated in 1805, when the *Lay of the Last Minstrel* marked a new epoch in literature. The general admiration of this lovely poem, led Pitt to appoint Scott one of the Clerks of Session, apparently discovering some connection between poetry and a snug berth, and, although Pitt died just at that time, the appointment was confirmed by Fox as is gratefully commemorated by Scott in the Introduction to *Marmion*.

Just one hundred years ago, therefore, to be exact on March 8, 1806, Scott's appointment was gazetted and he took leave of one profession to adopt another. His salaries as Sheriff and Clerk of Session, aggregated about £1500; his duties in the first office were not burdensome, while as Clerk he was only occupied during the sessions of the Court. The Clerk's duties were not so light as he modestly stated them to be, but called for diligence, accuracy and regularity, as frequent notes in his Journal attest, taking up probably about one-half of his time. For twenty-five years he held this office, until retired by disability, November 18, 1830, when his salary was reduced to £840.

His place in Court is still pointed out, where he wrote many a page of Waverley novels, to the accompaniment of long-winded argument, for Scott was never disturbed by his surroundings. He confesses he sometimes took a

nap. "The Lords," said he, "may keep awake and mind their own affairs;" but when Court adjourned and his duties were over, he was his own master and would pack up his papers in his green bag and hurry off to meet his friends at a "Gaudemus" or to buy a fine print of Charles Edward. Yet sometimes this official drudgery offended him. "Old Hutton," he relates, "*parcus et infrequens Deorum cultor*, used to say it was worth while going to a Presbyterian kirk for the pleasure of coming out, and truly I am of the same opinion as to the Court of Session."

In 1808, Scott was made Secretary of the Scottish Judicature Commission, which was appointed at the instance of Lord Eldon, who had no objection to innovations so long as they did not affect his own court which needed them the most. Scott regarded this as a post of considerable difficulty, as well as distinction. The commission reported in 1810, a bill which made great changes in the law and led Scott to write an essay on Judicial Reform, an able paper, portions of which are given by Lockhart.

Scott was opposed to the introduction into Scotland of trial by jury in civil cases, which occurred in 1815, and expressed his disgust with the inferior character of the jurors under the new system. He was also much opposed to the House of Lords sitting in London as a Supreme Court for Scotland, and predicted from it the downfall of the Scottish Bench, Bar and Law, and in *Redgauntlet* we find one of the characters, Hugh Redgauntlet, denouncing the Scottish advocates as mongrel things that must creep to learn the ultimate decision of their causes, to the bar of a foreign court. In the *Heart of Mid-Lothian* he expresses himself in favor of public executions on account of their effect on the spectator.

But while thus generally conservative, he was in advance of his time in advocating the abolition of capital punishment for all save a few crimes, and its infliction with certainty in all proper cases. He disliked the Scotch verdict "not proven," that *mediuu quid*, saying: that one

who is not proven guilty is innocent in the eye of the law. He objected to strict rules of court, e. g. those imposing judgments by default, which are seldom enforced because the penalty is disproportioned to the offence, so that the rule ends by being a scarecrow. He thought that attorneys ought to be fined for errors or omissions in practice.

Scott loved and honored his own profession and respected his brother lawyers. He used to say after he had retired from practice, that intelligent barristers were the best companions in the world and their conversation amused him more than that of other professional men, because there was more of life in it, with which, in all its phases, they became acquainted.

It is not, therefore, surprising to find Scott's novels filled with his impressions of the law and lawyers. He could afford (and so can we) an occasional jest at the expense of our profession or shall we say *craft*, but there is a vast difference between Dickens' treatment of law and lawyers and Sir Walter's. Dickens saw nothing good in either, and caricatured both. Scott on the other hand was an artist; he knew a thousand times as much about the subject as Dickens, and in his fair-minded manner, endeavored to give a just picture of it. But, naturally, the scamps of the law play a larger part in literature than their betters, for a good, well-behaved lawyer is in sooth a very prosaic individual. We—let us say we for the sake of euphony—do the day's work for a mere living wage, keep our clients out of the clutches of the Courts as much as we can; we labor on our briefs which nobody reads, except of course, the Judges for whose mental improvement they are intended, and when we die, our libraries, if we have any, are generally sold at auction. But a bad lawyer is such a picturesque villain that he is the stock character of every novelist and playwright—Judas Iscariot, if he were not a lawyer, is said to have carried a bag, the universal badge of our profession, so our enemies may regard him as an honorary member of the bar.

Scott puts in the mouth of *The Antiquary*, an estimate of the honest lawyer: "In a profession," says he, "where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their idleness and tricksters abuse it in their knavery but it is the more to the honour of those and I will vouch for many, who unite integrity with skill and attention, and walk honourably upright where there are so many pitfalls and stumbling blocks for those of a different character. To such men, their fellow citizens may safely entrust the care of protecting their patrimonial rights and their country the more sacred charge of her laws and privileges." *But*, "They are best aff, however, that hae least to do with them," said Edie Ochiltree, interrupting the panegyric.

In Paulus Pleydell, "a good scholar, an excellent lawyer and a worthy man," Scott undoubtedly reproduced some lawyer of his acquaintance, and Ticknor said that in conversing with Scott, he observed the similarity of the author's opinions with those expressed by Pleydell in *Guy Mannering*. We have already noticed how Mannering discovered Pleydell on a Saturday night at the tavern where he was celebrating a High Jinks. On the Sunday, Pleydell was a different man, piloted Mannering to church, and then took him home to dinner, where he showed Mannering his library filled with books, "the best editions of the best authors"—"These," said Pleydell, "are my tools of trade. A lawyer without history or literature, is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." * * * "It is the pest of our profession," continued Pleydell, "that we seldom see the best side of human nature. People come to us with every selfish feeling newly pointed and grinded. In civilized society, law is the chimney through which all the smoke discharges itself, that used to circulate through the whole house and put every one's eyes out." He sends for his clerk, Driver, who of course was at a High Jinks. "That's a useful fellow," said the

counsellor, "and he's such a steady fellow—some of them are always changing their alehouses so that they have twenty cadies sweating after them, but this is a complete fixture in Luckie Wood's, there he's to be found at all times when he is off duty: Sheer ale supports him, it is meat, drink and clothing, bed, board and washing." Then Scott gives an amusing account, too long to quote, of how Pleydell and Driver got up an appeal case on a Saturday night, during a High Jinks. "Law's like laudanum," said Pleydell, in another place, "it's much more easy to use it as a quack does, than to learn to apply it like a physician."

Even Geddes, the Quaker of *Redgauntlet* admits that he has known many righteous men who have followed the profession in honesty and uprightness of walk—"The greater their merit who walk erect in a path which so many find slippery."

Scott is strongest when he writes of Scotland and Scotchmen. He often admits that he knows little of English law, and when he speaks of it, he is apt to slip. But in Scots law and the feudal system, on which it was founded, he was at home. There was probably no country in which the feudal system was more deeply rooted and there is probably none in which so much of its spirit remains to this day. In no country was genealogy more generally studied; for one reason the canny Scot with his bonny blue een wide open for the main chance always considered the possibility of his becoming the ultimate heir of entailed estates.

Scott was proud of his ancestry. Some of his ancestors were Quakers, so he was proud of them, some were notorious Highland thieves, so he was proud of them; he loved a villain for a hero, if only he were Scotch; he loved the free booter's border raids, the stark moss-trooper's wild foray, he loved the stories of the dark days when Scotland's forests were filled with wild beasts pursued by wilder men, and men in turn were chased with savage hounds—men of whom he sang:

"Wild through their red or sable hair,
Looked out their eyes with savage glare
 On Marmion as he pass'd,
Their legs above the knee were bare,
Their frame was sinewy, short and spare
 And hardened to the blast."

These savages ate their venison raw, squeezing out the dripping blood between pieces of wood.

In the time of Charles I, a fellow known as Christie's Will, kidnapped a Judge whose opinion was likely to be undesirable, and kept him close until the case was finished; which was considered an excellent joke. A sheriff who had become somewhat unpopular, was plunged into a boiling cauldron and furnished broth for his murderers. Among the most ferocious of these savages were the blood-thirsty Macleods, a tribe of Scandinavian extraction, whose feud with the MacDonalds is told by Scott in the *Lord of the Isles*. These terrible wretches finally discovered the MacDonalds in a cavern, built a fire at the entrance and suffocated the whole tribe. In 1814, Scott visited the cave and found recent relics of the massacre, bringing away a MacDonald skull as a memento. Once James VI tried to civilize the Macleods by introducing colonists among them, but the Macleods rose against the intruders and exterminated them.

Scott was a gentle spirit, but his heart warmed within him, when he read and told of all these things. After all, these fellows were Scotchmen and he was a Scot and it was all as glorious and grand as the sounding verses:

"Regibus et legibus Scotici constantes
Vos clypeis et gladiis pro patriis pugnantes,
Vestra est victoria, vestri est et gloria
In cantu et historia, perpes est memoria."

We do not ordinarily expect to find much of legal interest in poetry; not only however do Scott's poems contain many legal allusions, but Scott has added to them fre-

quent annotations. He appends to the *Ballad of Johnie Armstrong* the bond of man rent, showing the feudal service by which the Armstrong held his land of Lord Maxwell, Warden of the West Marches. *Lord Maxwell's Good-night* suggests the bond of man rent between Kirkpatrick and Lord Maxwell. Scott notes in connection with the Lochmaben Harper, the peculiar allodial rights of Bruce's tenants; the bond of alliance or feud stanching between the clans of Scot and Ker, and he also refers to numerous unusual forms of feudal tenure.

The law of Clan MacDuff granted exemption from ordinary jurisdiction in cases of homicide, without pre-meditation, to any member of the clan who took refuge at MacDuff's Cross. In *Sir Tristrem*, Queen Ysonde is condemned to essay the ordeal of hot iron, and Scott appends a long note on the subject. In the *Lay of the Last Minstrel* he refers to the "neckverse" of the 51st Psalm, which was read by those claiming benefit of clergy, to save their necks. Earl Morton claims his vassals best steed as heriot, thus provoking a conflict so that:

"The valley of Eske from the mouth to the source
Was lost and won for that bonny white horse."

The oath ordeal is prescribed to Deloraine for march treason; we have the mutual defiance of the English and Scottish heralds; and the trial by single combat between Musgrave and Deloraine, so characteristic of the feudal system and ancient law, of which Scott gives a long description.

In *Marmion* Scott refers again to the trial by combat and to the feudal tenure under which land was held of the Abbot of Whitby:

"Then Whitby's nuns exulting told
How to their house three barons bold,
Must menial service do."

Most interesting is the fate of Constance de Beverley, "immured" as punishment for her sin:

"Yet well the luckless wretch might shriek,
Well might her paleness terror speak!
For there were seen in that dark wall,
Two niches, narrow, deep and tall;—
Who enters at such grisly door,
Shall ne'er I ween find exit more.
And now that blind old Abbot rose,
To speak the Chapter's doom,
On those the wall was to enclose
Alive, within the tomb;—"

Truly a gruesome fate recalling Poe's tale of the Cask of Amontillado and Balzac's *La Grande Bretèche*.

But now comes Professor Maitland, who shows us in his essay on *The Deacon and the Jewess*, that we are all wrong about the word "immuratus;" that it does not mean "walled in," but merely imprisoned for life and fed on bread and water, a very unromantic punishment, in short that we must not "take our *Marmion* too seriously." Such is our respect for this great scholar, whose mere guess is better than a thousand arguments, that we must place this story also upon the shelf where rest our shattered illusions. So fare-thee-well, O shade of Constance de Beverley, and fall upon thy bended knees, if haply shades have knees, before your Champion, who, after four centuries, hath rescued thee from a lingering and horrible death.

In *Rokeby*, Scott gives us the Statutes of the Bucaniers by which the pirates distributed their booty:

"When falls a mate in battle broil
His comrade heirs his portion'd spoil;
When dies in fight a daring foe,
He claims his wealth who struck the blow."

In this poem Bertram unconsciously declares himself to be the murderer of Mortham, and Scott in a note speaks of the frequency with which conscience stricken men, impelled by the Imp of the Perverse, confess or

allude to their crimes and refers to the case of Eugene Aram, mentioning also another case from his personal experience.

In *Rokeby* Scott introduces the ballad of Wild Darrell of Littlecote Hall, with which is connected the name of Sir John Popham, Chief Justice in Queen Elizabeth's time. The tradition is that Popham acquired Littlecote Hall from the owner as a bribe for his permitting Darrell to escape the penalty of his crime. Campbell in his life of Popham, takes the story from *Rokeby* and Scott's notes.

We will now go through the *Waverley* novels and extract some of the more interesting of Scott's legal references. To collect all would unduly expand this paper.

Much of the humor of *Waverley* is furnished by the Baron of Bradwardine and Bailie MacWheeble, the latter belonging either to the clan of Wheedle or that of Quibble, both having produced persons eminent in the law. Bradwardine, himself, had studied law, but by never engaging in practice, had to the best of his inability, discharged the debt he owed to his profession. He was fond of interlarding his conversation with legal phrases to show his knowledge of the science, and his favorite theme was the feudal tenure under which he held his barony by charter from David the First "cum liberali potestate habendi curias et justicias, cum fossa et furca, et saka et soka, et thol et theam et ingangthief et outgangthief, sive hand habend sive balkbarend" and as no one knew the meaning of all these words, his self importance was vastly increased. His tenure would be called in England, grand sergeanty and consisted "in servitio exuendi seu detrahendi, caligas regis post battaliam," that is in undoing or pulling off the king's boots after a battle; and although his only child was his daughter Rose, he persisted that his barony, on account of the nature of the feudal service, was a male fief, passing at his death to a distant cousin. After the battle of Preston Pans, in which the Baron fought on the side of Charles Edward, he insisted on performing the ceremony, despite

the fact that Charles Edward was Prince, not King, and did not wear boots but brogues.

Scott describes how after Culloden, Fergus MacIvor is tried and executed for high treason—one of the blessings we are told which England had conferred upon Scotland, whose laws in that respect had been milder, but the attainder of the Baron and Waverley were removed by pardons secured by lawyers Clippurse & Hookem. Colonel Talbot in gratitude to Waverley, purchased the estate from Inchgrabbit the heir male, and conveyed Tully Veolan to its old owner, burdened only with a marriage settlement in favor of Waverley and Rose; the story ends with Duncan MacWheebie singing the Hymeneal anthem of how he circumvented Inchgrabbit and his lawyer, in driving the bargain; and at the last the old man draws up "a wee minute of an ante-nuptial contract intuitu matrimonii, so that it cannot be subject to reduction hereafter as a donation inter virum et uxorem,"

Scott refers in *Waverley* and again in *Redgauntlet* to the leading case of Luckie Simpson's cow. It was an old custom in Scotland for the landlord, as his parting guest stood at the door, about to mount, to present him with a farewell drink called the stirrup cup. Now Luckie Jamieson had brewed a peck of malt, and set the liquor at her door to cool. Luckie Simpson's cow came wandering by, seeking what she might devour, was attracted by the foaming beverage, smelt, tasted and yielded to the tempter. The unaccustomed drink mounted to the animal's head, descended to her legs, and affected her understanding in both directions, so that her guilt was apparent to the enraged alewife, who demanded of Luckie Simpson the value of the brew. Litigation ensued, the Bailie heard the case and then enquired of the plaintiff whether the cow had sat down to take her drink or imbibed it standing. It being admitted that the cow had committed the deed whilst on her feet, the Court adjudged the drink to be a stirrup cup for which no payment could be demanded and dismissed the suit.

The plot of *Guy Mannering* was taken from the case

of Annesley v. the Earl of Anglesey, tried in 1743, 17 State Trials, 1225, and Scott appropriated the names of many of the witnesses to characters in the novel, which contains many legal incidents. As Paulus Pleydell represents the respectable lawyer, Gilbert Glossin is the shyster. He tries to push the sale of old Bertram's property, in order to buy it in, and get possession before the long-missing heir should return, it being understood that the property could not be sold for debt if the heir were living.

The examinations of Dirck Hatteraick by Glossin, sitting as a magistrate, of Vanbeest Brown by Sir Robert Hazlewood, and of Hatteraick and Glossin by Pleydell, Sir Robert Hazlewood and MacMorlan, illustrate the differences between the English and Scottish procedure; the latter more resembling the French system, of private examinations previous to trial, although the "third degree," as practised here, might give suggestions to both. Glossin being committed as accessory to the kidnapping of Harry Bertram, claims it to be a bailable offence and refers to a case where resurrection women, who had promised to secure a child's body for dissection, stole and murdered a child rather than break their word and disappoint their employers.

Those of us who have had the pleasure, after a funeral, of reading the will to the assembled family, will appreciate Mr. Protocol's performance of that solemn, but sometimes amusing business.

"Mr. Protocol having required silence, began to read the settlement aloud in a slow, steady, business-like tone. The group around, in whose eyes hope alternately awakened and faded, and who were straining their apprehensions to get at the drift of the testator's meaning, through the mist of technical language, in which the conveyance had involved it, might have made a study for Hogarth." As the document was of an unexpected nature, with contingent uses to charities, the effect was startling—and produced much mortification which is Scots law for mortmain.

In Scots law it will be noticed a testamentary disposition of lands was effected by means of a trust deed or *moris causa* settlement, reserving a life estate to the grantor, quite different in form, however similar in effect to wills as we know them. However, a common lawyer must not venture to meddle with a Scotch will lest he be guilty of vicious intromission, and in addition expose himself to unfeeling criticism. To quote the elegant remark of Earl Douglas—"The man sits full still that has a rent in his breeks."

In the last chapter of *Guy Mannering*, a reference is made to the macer's court, composed of tipstaves, as we should call them, who constituted a special court for trying questions of relationship and descent, the judges acting as assessors to their own doorkeepers. When Dinmont visits Bertram in jail, the keeper wants to lock up the jail, refusing to allow Dinmont to stay because he had committed no malefaction. "I'll break your head," was Dandie's reply, "if ye say ony mair about it, and that will be malefaction eneugh to entitle me to ae night's lodging wi' you ony way." The argument was successful, for as the jailor remarked, "A wilful man maun hae his way."

The plot of *The Antiquary* turns on the legality of the marriage of Lord Glenallan and Eveline Neville, but its chief interest to the lawyer will be found in the entertaining conversation of the Antiquary, Jonathan Oldbuck. The Antiquary had read law and made himself master of the learning of the feudal law, but being under no necessity to practice, had followed his natural bent and cultivated his taste for old books and ancient learning. He would ponder over an old black letter copy of the Acts of Parliament for days rather than play golf; he would trace the vestiges of an old Roman camp; and he discovered a curious stone inscribed with initials interpreted in a learned manner by the Antiquary, and in a trivial fashion by Edie Ochiltree, reminding us of the similar story of the stone discovered by the Pickwick Club which, indeed, Dickens may have borrowed from Scott.

The *Antiquary* is ready to remind Dousterswivel of the Act of 9 George II, c. 5, against cheats and imposters, warns Hector McIntyre not to interfere with the sheriff's officer, on account of the Statute of William the Lion against deforcement, and in the entertaining examination of Edie Ochiltree before Bailie Littlejohn, cites the Act of 1701, regulating bailbonds and so obtains Ochiltree's release on nominal bail. So he gives us an amusing account of the law of imprisonment for debt in Scotland, which, technically, was not permitted; but any one who disobeyed the King's writ requiring payment, was proclaimed by three blasts of a horn at Edinburgh market place to be a rebel and imprisoned by an elegant legal fiction, for his ungrateful contempt of the royal mandate.

The *Antiquary* delighted in the old-fashioned nick sticks or tallies used by bakers to record the number of loaves sold to their customers, just as accounts used to be kept by the Exchequer. The writer can remember, as a boy, that this ancient method was used by bakers in this city.

In the *Antiquary* we are told the story of the ghost who appeared to the despairing litigant and showed him the secret depositary of the old deed, the missing link in his chain of title; and in the opening of the book, mine host Mackitchinson, speaks of Hutchison against Mackitchinson—"a weel kenn'd plea, about our back-yard; a ganging plea my father left me and his father afore left him. It's been four times in afore the Fifteen and deil ony thing the wisest o' them could make o't but just to send it out again to the Outer house. O, its a beautiful thing to see how long and how carefully justice is considered in this country!"

"The clergy," says the *Antiquary*, "live by our sins, the medical faculty, by our diseases, and the law gentry, by our misfortunes."—But much of the *Antiquary's* conversation is like certain flowers that lose their perfume when cut. You must them enjoy where they grow.

In *Rob Roy* frequent allusion is made to the contracts of black mail, an ingenious arrangement on the Border, by which the most powerful scoundrel, such as Rob Roy,

agreed to insure his customers or clients against thefts, for an annual sum. He then employed one half of his thieves to steal and the other half to recover stolen cattle. Those who received or paid money under contract of blackmail, were guilty of a capital offence under a statute of 1567, but as Nicol Jarvie observed, "if the law canna protect my barn and byre what for suld I no engage wi' a Hieland gentleman that can? Answer me that."

Squire Inglewood and his clerk Jobson, the rascally attorney, figure in this book; the former being one of the quorum and custos rotulorum, an office of which Sir Edward Coke wisely saith, "The whole Christian world hath not the like of it, so it be duly executed." The examination of Frank Osbaldistone by these worthies is well told. Jobson has the statute law at his tongue's end, but it is a relief to know that he is finally struck off the list of attorneys.

Bailie Nicol Jarvie is one of the best of Scott's characters, and his description of life in the Highlands is amusing. "Never another law hae they but the length o' their dirks; the broadsword's pursuer or plaintiff as you Englishers ca'it, and the target is defender; the stoutest head bears largest out; and there's a Hieland plea for ye." Rob, himself, cared little for legal forms, for when he paid his debt, Jarvie signed the receipt, but could not find two witnesses, as required by law. Rob remarked that no man within three miles knew how to write, and threw the bond in the fire with the words, "That's a Hieland settlement of accounts."

In *Old Mortality* our attention is arrested by the examination and torture of Ephraim MacBriar, the Cameronian zealot, by the Privy Council of Scotland, in which both judicial and executive powers were vested. Scott gives a most graphic description of MacBriar's dauntless refusal to incriminate other persons than himself, his fearful torture with the boot, his persistent defiance and his speedy execution for treason. It is hard to realize that such things were done with the sanction of law little more than two hundred years ago.

The Heart of Mid-Lothian, that great prose drama, marred only by its strange anticlimax (for Scott was generally artistic enough to stop when he was done) is replete with interest to the lawyer. Jeanie Deans is one of the greatest heroines of fiction—yet not of fiction, for she really lived as Helen Walker; and Scott truly says, “in the State Trials or in the Books of Adjournal, every now and then you read new pages of the human heart and turns of fortune far beyond what the boldest novelist ever attempted to produce from the coinage of his brain.”

The story is familiar. Effie Deans was indicted under the Statute of 1690, c. 21, which in case of child murder, enacted that certain facts should constitute legal presumptions of guilt, to wit: the concealment by the mother of her condition, and the death of the child or failure to produce it. The Act was passed apparently upon the suggestion of the Court *Re Smith*, (1679.) 1 Fountainhall, 47, who referred with favor, to the English Statute 21 Jac. I. c. 27, on the subject; and though afterwards modified in practice, the law was not repealed until 1803.

Passing over the preliminary examination of David Deans, and that wonderful and pathetic scene between Jeanie and Effie, on the eve of the trial,—Scott never wrote a stronger chapter—we come to the trial itself. Scott disclaims the ability to describe the forms of a Scottish criminal trial so accurately as to abide a lawyer's criticism, but we must assume that this statement was intended to disguise his authorship, then anonymous, *and that his account is technically correct.

Scots law, more liberal than the English, allowed counsel to the panel or defendant, and Effie's attorney was Mr. Nichil Novit, her advocate was Mr. Fairbrother. According to the practice in Scotland, the witnesses were “enclosed”, or separated from all information of what was passing, and called into court when their testimony was desired.

*An anonymous writer, however, evidently an English lawyer, in 5 Law Review 44 (1846), severely criticizes Scott for his inaccuracy in legal allusions, particularly in his account of this case.

The writer has seen this practice followed in Jamaica, even in a civil case. When the court opened, Effie, between two sentinels, with bayonets, was arraigned to the indictment; she pleaded not guilty and both counsel addressed the court, speaking to the indictment and the defence, viz. that the prisoner had communicated her condition to her sister. The court then pronounced the indictment and the defence relevant and the jury was empanelled; the prisoner again pleaded, and then the witnesses were heard. It will be noted that in Scotland the accused is subjected to a preliminary examination. He may refuse to answer, but if he answers, the record of the examination may be used as corroborative evidence against him at the trial. Effie's declaration, accordingly, is read in full. Her counsel first offered proof of character and then called Jeanie as his principal witness. She was sworn and certain formal questions were put to her, including "whether any one had instructed her what evidence she had to deliver." It seems possible from this, that in the Scottish practice counsel are not at liberty to confer personally with their witnesses, for Fairbrother to his great mortification, when he puts the crucial question, receives the reply that Effie had said nothing to her. This ruins the case, for Fairbrother can do nothing but argue as to the legal effect of the prisoner's declaration, as to which he cites learned authorities, laying stress on the highly penal nature of the statute.

The Court charges the jury, who retire for conference; upon their return, they render a sealed verdict, a lighted candle is extinguished and the verdict of Guilty with a recommendation to mercy is read. The Court, in pronouncing sentence, calls the Doomster, a tall haggard figure, dressed in a fantastic garment of black and grey, to repeat the sentence of death, and he adds the words, "And this I pronounce for Doom."

But there is another vein in *The Heart of Mid-Lothian*. Indeed this masterpiece contains many illustrations of the close connection of tender sympathy and genuine humor. Bartoline Saddletree—called Bartoline perhaps

after Bartolus, a learned Doctor of the Law, or perhaps after Bartolinus, another less celebrated Jurist, is an amateur lawyer, who throughout the story freely gives his opinion upon all legal questions. His favorite book was Balfour's *Practiques*, his genius lay towards the weightier matter of the law, and he regularly attended the courts to the great neglect of his business, which Mrs. Saddletree conducted, a lady well qualified by nature and experience to assume at a moment's notice the leading soprano role in the matrimonial duet. Bartoline indeed was like a Territorial Delegate in Congress, permitted to talk but not to vote. His conversation is always interlarded with legal terms, he discusses in a masterly way the guilt of Captain Porteous of whose case Scott gives a full account; and explains to Mrs. Saddletree the theory of legal presumption in Effie's case. "The crime is rather a favorite of the law, this species of murther being one of its ain creation." "Then if the law makes murders," said Mrs. Saddletree, "the law should be hanged for them; or if they wad hang a lawyer instead, the country wad find nae faut."

His account of the pleadings in Marsport vs. Lackland, is unfortunately too long to quote; but we must notice his remark that the better the pleadings the fewer understand them, and his cold-blooded criticism of lawyers' fees: "After a', its but the wind of their mouth, it costs them naething, whereas in my wretched occupation of a saddler, we are out unconscionable sums just for hides and leather"—Nor should we overlook the case of Crombie vs. MacPhail, involving the law of stillicide or easement of dripping water. Mrs. Crombie owned the inferior tenement, "obligated to receive the natural water drap of the superior tenement, sae far as the same fa's frae the heavens on the roof of the neighbor's house and from thence, by the gutters or eaves upon the inferior tenement. But the other night comes a Highland quean of a lass and she flashes God kens what out at the east-most window of Mrs. MacPhail's house—that's the superior tenement. I believe the auld women wad hae agreed,

for Luckie MacPhail sent down the lass to tell my friend Mrs. Crombie that she had made the gardyloo out of the wrang window out of respect for twa Highland gentlemen, that were speaking Gaelic in the close below the right one. But, luckily for Mrs. Crombie, I just chanced to come in in time to break aff the communing, for it's a pity the point suldna be tried. We had Mrs. Mac Phail into the Ten mark Court. The Hieland limmer of a lass wanted to swear herself free—but haud ye there, says I"—Unfortunately here Saddletree is interrupted and we shall never know whether he was able to have this delicate question of easement settled by the Court.

That sombre and fateful tragedy, *The Bride of Lammermoor*, is drawn from the family history of James Dalrymple, who, as Lord Stair, was one of the most conspicuous figures in Scottish jurisprudence. His daughter had engaged herself without the knowledge of her parents and was compelled by them to marry the suitor of their choice, with the fatal results closely copied by Scott in his novel.

Edgar, the Master of Ravenswood and Lucy Ashton, likewise become betrothed in secret and she, it seems, was under age. Sir William Ashton her father, a lawyer, was Lordkeeper, a politic, proud, wary and timid man, who had come into possession of the ancestral estates of the Ravenswoods by means of certain transactions with the old Lord, Edgar's father. While it is not clearly stated, he had apparently advanced money to Ravenswood and had taken technical, though legal advantage of non-payment, to obtain decisions of the Scottish courts in his favor. These judgments, however, were open to attack in the British House of Lords, upon equitable grounds, and Ravenswood was encouraged to appeal by his kinsman and patron, the Marquis of A—

The engagement of Lucy was repudiated by her parents upon the authority of the Levitical law, as stated in the 30th chapter of Numbers, to the alleged effect that a woman is not bound by a vow, from which her parents dissent. Ravenswood leaves the country upon a mission

for his patron, the Marquis; Lucy, under command of her mother, writes to break her engagement, no answer is received, the day appointed for her marriage to Bucklaw is fixed, and finally arrives. Just too late, as the marriage contract is signed, Ravenswood appears, and to him the Reverend Mr. Bide-the-bent reads the text upon the authority of which he had declared the nullity of the prior engagement. "If a woman vow a vow unto the Lord and bind herself by a bond being in her father's house in her youth; and her father hear her vow and her bond wherewith she hath bound her soul, and her father shall hold his peace at her; then all her vows shall stand, and every vow wherewith she hath bound her soul shall stand. But if her father disallow her in the day that he heareth; not any of her vows or of her bonds wherewith she hath bound her soul shall stand; and the Lord shall forgive her, because her father disallowed her."

In *Ivanhoe*, we pass over Scott's references to the Forest laws; the legal status of the Jews temp. Richard I, and other topics, incidentally mentioned, until we reach the trial of Rebecca for sorcery, in the conclusion of the book. Bois Guilbert had rescued Rebecca from the blazing castle, and brought her to the Templar's Preceptory of Templestowe, with the connivance of Malvoisin the Preceptor. Beaumanoir, the Grand Master, making an unexpected visit, is induced to believe that Rebecca had bewitched Bois Guilbert by her magical art, and the Grand Master at once asserts his power and intention to try Rebecca for witchcraft.

The trial is conducted by the Grand Master with elaborate ceremonial. He refers to the rules of the Templar order, as stated by St. Bernard, recites their infraction by Bois Guilbert, especially the chapter "Ut fugiantur oscula," and attributes his fall to Rebecca's witchcraft. Rebecca, interrogated in her defence and acting upon the secret suggestion of Bois Guilbert, demands a trial by combat, and throws down her glove which is given to Bois Guilbert, appointed to do battle in behalf of the Order; all of which is engrossed at length in the official

minutes of the Chapter. The trial by combat is appointed for the third day and Rebecca sends word to Isaac of York to send Ivanhoe to be her champion. Upon the fateful day, the lists are ready and all the preparations described by Scott, with his usual zest. Ivanhoe, of course, gallops up at the psychological moment, and the Grand Master throws Rebecca's glove into the ring with the fatal signal words, "Laissez aller;" or as we might say, "Let her go!" After the combat and the Templar's death, King Richard appears. Malvoisin is arrested on a charge of treason and the Templars, Grand Master and all, are expelled from their castle.

What powers the Knights Templar arrogated to themselves in England, and what jurisdiction they assumed to try and condemn persons who were not members of their order, are questions which Scott does not attempt to answer, and we are in the position of the Scotch minister who, when asked what he did when confronted by difficult theological problems, replied, "I look them straight in the face and pass them by."

In *The Monastery* Scott, in speaking of the rural superstitions concerning fairies, mentions a case which came before him as sheriff, in which a shepherd mistook the figures in a Punch and Judy show for the "Good neighbors." He also refers to the old feudal rights of the Church in Scotland, and the obligation of tenants to have their corn ground at the mill of the barony, and using the technical phrases of *intown* and *dry multures* and *thirlage* *invecta et illata*, intimates that he talked not without book; nor does he hesitate to quote a sentence from the Decretals.

In *The Pirate*, Scott refers to the trial of Gow, the pirate, before the Admiralty Court in 1725, where Gow refused to plead, thereupon the court ordered his thumbs to be squeezed with whip cord as a mild preparation for the peine fort et dure; upon which the pirate finally consented to bring himself within the jurisdiction of the

court. Scott notices the Udallers or allodial possessors of the land in Zetland where the Norwegian law prevailed, and the scat and wattle, hawkhen, and hagelef or dues from the peasants to the lords. He refers to the law of wreck, to Flotsam and Jetsam, to the right of property in a stranded whale, and to Treasure trove, though all his statements are not entirely in agreement with the English law.

In *The Fortunes of Nigel*, the hero is about to lose his estates by eviction, under an overdue Wadset, which is the attractive name of a Scotch mortgage. He came to London to ask of King James I the repayment of a large sum, which that monarch had borrowed of Nigel's father. As that wisest fool in Christendom was not such a fool as to pay his royal debts before he was reminded of them, the sympathetic aid of his banker, the celebrated George Heriot, was enlisted. James then pledges his jewels to Heriot for an immediate advance of cash to Nigel for his present benefit, gives him directions to negotiate a loan to clear Nigel's mortgage and signs his royal warrant in addition as security. Heriot repledges the jewels to old Trapbois, the usurer, for the cash and obtained from the Lady Hermione money to pay off the mortgage or rather to procure an assignment of it, for it would seem that the mortgagee when given the money could be required to assign.

Meantime, Nigel having fought with Lord Dalgarno, his false friend, in St. James Park, within the verge of the court, committed a breach of privilege—a Star Chamber business, he was told, which might cost him his right hand; so he fled to Whitefriars near the Temple, so called from the church of the Carmelites or Whitefriars. This precinct was known by the cant name of Alsatia, a name borrowed from the debatable land between France and Germany and had at this time and for nearly a century after, the privilege of sanctuary, unless

against the writ of the Lord Chief Justice or Privy Council. King James I confirmed this privilege, it is said, by his charter in 1608. There is an interesting account of Alsatia in the Introduction to Inderwick's Calendar of the Inner Temple.

In Nigel's flight he is assisted by Lowestoffe, a young Templar, chiefly distinguished by his performances on the French horn, so annoying to Counsellor Barratter, who occupied the chambers beneath. The desperadoes and vagabonds of Alsatia, living without the pale, had a semi-organized government of their own which Scott minutely describes. Nigel lodges with old Trapbois who steals the King's warrant from him, and is then murdered by an outlaw in an attempt to steal the King's jewels which Heriot had deposited with the usurer. Martha, Trapbois' daughter, however, escapes with and marries Richie Moniplies Nigel's servant, taking with her all Trapbois' money, the jewels and the royal warrant. Nigel is sent to the Tower on a charge of treason and the King takes this opportune time to tender Heriot the amount of his loan, and demand the return of the jewels. Heriot cannot produce them and the King, after tormenting him for a while, produces the jewels which had been returned to him by Richie Moniplies. It then turns out that Dalgarno had formerly deceived the Lady Hermione by a mock marriage, and the fraud being discovered, is compelled to marry her legally. This done, he claims title to her property including the mortgage which, however, Richie pays off on the last day with the old miser's money, returns the royal warrant to the King, and presents Nigel, on the latter's wedding day, with the title deeds of his estate.

In *Peveril of the Peak*, the two Peverils are accused of complicity in the notorious Popish plot. The account of Julian's arrest and examination before Justice Maulstatute, shows in an interesting manner the terror which

pervaded the community at the time. Julian is committed to Newgate and afterwards we find him in the Tower with his father; whence they are soon taken to their trial before the infamous Lord Chief Justice Scroggs. Dr. Titus Oates was the chief witness for the Crown, and Scott's narrative of the trial shows that he had studied the history of the times and the State Trials. Fortunately for the Peverils, Oates was now becoming unpopular and Scroggs, by the private connivance of Charles II, charged in favor of the Peverils who were acquitted.

Readers of *Peveril* will also remember the trial and execution of William Christian, in the Isle of Man, who had incurred the enmity of the Countess of Derby, the island belonging at that time to the Earldom; but the limitations of this paper do not permit more than this passing reference.

Scott alludes, also, to the tenures by which real estate was held in Man. Scott states that the transfer of land was made in open court where the grantor delivered to the grantee a straw as evidence of title. Pollock & Maitland II, 184, refer to a similar custom in some parts of England. Citing Coke 4 Inst. cap. 69, Scott suggests that "stipulation" is derived from such a *traditio stipulae* or delivery of a straw, a fanciful etymology perhaps, but very much older than Coke.

In the story the Countess of Derby purchased the girl Fenella from her master, a rope dancer, or montebank, to whom she had been apprenticed, and Scott supports the incident by the case of Reid v. Scott of Harden, Fountainhall Vol. I. p. 441, (1687), where Reid, who had bought a dancing girl from her mother for about twelve dollars, sued Scott with whom the girl had taken refuge. The Court quoted the law of Moses, held that there were no slaves in Scotland, that mothers could not sell their bairns and dismissed the case. Scott adds with pride that he was directly descended of the father of this champion of humanity.

The mainspring of the plot of *Quentin Durward*, to use Scott's own words, "is that which all who know the least of the feudal system can easily understand. The right of a feudal superior was in nothing more universally acknowledged than in his power to interfere in the marriage of a female vassal." In the story the young and beautiful Countess Isabella of Croye, a vassal of the Duke of Burgundy, invokes the protection of King Louis XI, as lord paramount. Her romantic adventures, perils and tribulations, and her safe and happy deliverance, through the bravery of Quentin, however thrilling, are many leagues distant from the subject of this paper.

Readers of that entertaining story, *St. Ronan's Well* may remember the managing committee of that health resort; the Man of Religion, the Man of Mirth, the Man of Peace, Captain MacTurk; the Man of Medicine, Dr. Quackleben; and the Man of Law, Saunders Meiklewham. The lawyer's nose projected from the front of his broad, vulgar face, like the style of an old sundial, twisted all of one side. He was on excellent terms with Dr. Quackleben, who always recommended him to make the wills of his patients—a prudent measure, as the Doctor's method was always to "give the disease its own way at first and then watch the turn of the tide," and he used to say that "robust health was a very alarming state as most sudden deaths happen to people in that condition."

The plot of the story turns upon the will of Lord Etherington's uncle, Scrogie Mowbray, settling the estate upon Etherington on condition that he should, before attaining the age of 25, marry a young lady of the name of Mowbray, and by preference of the house of St. Ronan's, with limitation over. Clara Mowbray answering to this description was engaged to Francis Tyrrel, half brother to Lord Etherington, who thereupon arranged a private marriage ceremony in which he personated Francis. The fraud was almost immediately detected and Clara returned to

her home. The validity of the marriage became, naturally a grave question, which Scott solves in rather a clumsy fashion, by killing off the principals instead of obtaining a commonplace decree of the court annulling the marriage, which a lawyer of his attainments might surely have done.

The comedy parts of the novel are sustained by the great Meg Dods and her lawyer, Mr. Bindloose, who was also Sheriff Clerk. Meg consults him professionally and he thinks she intends to write her will which he says is the act of a careful and of a Christian woman. "Oh! it's an awful thing to die intestate if we had grace to consider it"—a survival of the ancient belief as to the danger to the soul of one dying without remembering the Church. But Bindloose was mistaken, for Meg came to report the disappearance of Francis Tyrrel and her fear that he had been murdered, with which theory Bindloose disagreed. "Be reasonable," said he, "consider that there is no *corpus delicti*"—"Corpus delicti? and what's that?" said Meg, "something to be paid for, nae doubt for your hard words a' end in that; and what for suld I no have a *Corpus delicti* or a *Habeas Corpus* or ony other *corpus* that I like, sae lang as I am willing to lick and lay down the ready siller?" The lawyer explains that there was no proof that the man had been slain, and no production of his dead body. "And that is what we call the *corpus delicti*." "Weel then, the deil lick it out of ye," said Meg rising in wrath and bringing the consultation to an end by calling her counsellor an old fool.

There is probably none of Scott's novels which contains more legal terms and allusions than *Redgauntlet*, and this is particularly interesting to the lawyer, by reason of the *cause celebre* of Peebles vs. Planestanes (Anglice Pebbles vs. Pavement) which supplies the comedy part of the story.

Scott drew Alan Fairford from his own experience, and Peter Peebles "that dreadful piece of realism," says Ste-

venson, was also drawn from life; called Poor Peter because a suitor *in forma pauperis*, a wornout litigant, half crazed by fifteen years' experience in the Courts, with a new solicitor every year—he wished he had a new coat as regularly—broken down with poverty and drink, the laughing stock of the Courts and yet proud of his notoriety, as the best known litigant in Edinburgh. When asked for his occupation he said, "If I am laird of naethin else I am aye a dominus litis" i. e. Laird of a lawsuit.

Now, as soon as Alan had given his "bit chack of dinner" and had put on his advocate's gown, old Fairford plunged his son into this whirlpool of a suit with the encouraging remark that the young advocate was like the young doctor, who must walk the hospitals and cure Lazarus of his sores before he could be admitted to prescribe for Dives when he has an indigestion. So Fairford coolly tells Alan that he must argue the case on appeal upon the Tuesday following, and overrules his objection that his inexperience would be fatal. "Ye cannot spoil it Alan," said he, "that is the very cream of the business; there have been ten or a dozen agents concerned and the case is come to that pass that Stair or Arniston could not mend it, and I do not think even you, Alan, could do it much harm." Young Domtoustie of that Ilk, had been appointed by the court to represent the pauper suitor, and was so alarmed by the prospect that he fled the town, so Alan is forced to take his place. The case was an action for an account between former partners with a cross action and divers complications of Scots law, including that mysterious process called a multiple-poinding which Peebles himself swore, by the Regiam Majestatem! was the safest *remedium juris* of all, as it might even be conjoined with a declarator of marriage. Scott in a note says that Multiplepoinding is equivalent to what is called, in England, Double Distress, which to the common lawyer, explains the obscure by the

unknown, for double distress is itself a Scotch term for two competing executions. Peebles claimed there was not a lawyer in England that kend the nature of a multiplepoinding, but this creature of the law seems almost, if not exactly our familiar friend, Interpleader Bill, disguised in Highland plaid and breeks.

To add to Peter's glory, he had the good luck to provoke Planestones to pull his nose at the very threshold of the Court, and claimed this was not a mere assault, but constituted Hamesucken, the essence of which is to strike a man in his own home, for in truth the Court might be said to be Peter's dwelling place.

It would be too long to tell the history of this famous case, how Alan at the very moment of success, hurries away from the court room to succor his friend Latimer, how the case is remitted to an accountant to report, and how the angry Peebles serves both the Fairfords, as solicitor and advocate, with a complaint for malversation in office. He pursues Alan over Scotland and into England, demanding a "fugie warrant" of arrest to bring him back. When Justice Foxley asks him if he will take oath that Alan was a runaway apprentice: "Sir," said Peter, "I will make oath of anything in reason, when a case comes to my oath, it is a won cause. All's fair when it comes to an oath *ad litem.*" But the whole book is flavored with the case, and it must be read as a whole to be appreciated.

We must pass over, with a mere reference, other passages in *Redgauntlet*, written as only a lawyer could write them; such as the law relative to the salmon fishing with nets in the Solway, as practiced by Geddes the Quaker, and the application of the law of riot to those who forcibly destroyed them; the differences between the laws of Scotland and England, by which it resulted that Darsie Latimer (or Redgauntlet) while safe in Scot-

land, was subject in England, where he had property, to his uncle, and guardian, Hugh Redgauntlet; the hearing of Latimer before Squire Foxley, who complained that he was expected to carry the whole law of England in his head and a *posse comitatus* to execute it in his pocket; the smuggling cases to which Scott alludes, as coming before his court in Selkirkshire; and finally the tradition that at the coronation of George III, the solemn challenge of Dymock the hereditary champion, who flung down his gauntlet as the gage of battle, was accepted by an unknown woman, whom Scott for the sake of the story identifies as Lilius Redgauntlet, the romantic Green Mantle of the story—all these things and many more, may be read in this interesting novel, as reference being thereunto had may more fully and at large appear.

The story of *The Betrothed* was suggested to Scott by the poem of the Noble Moringer, which he had translated from the German many years before, and this was founded upon that wholesome rule of the law that no man should stay away from home for seven years, without writing a letter to his wife to let her know that he is still *in esse*. For if, after seven years' absence, he casually turns up at the old homestead, he must not be surprised if he finds that his domestic affairs are not exactly as he left them. The Noble Moringer leaves his lady to go on pilgrimage and pledges her to wait for his return seven years with a day added for good measure. The time fairly flew; the Moringer never thought of writing home, and the last day came when the Moringer is warned in a dream of what is going on at home, and when he wakes, he finds himself by the kindly aid of St Thomas, conveniently near his own castle. In pilgrim garb and unrecognized, he joins in the wedding festivities and drops his wedding ring in his wife's cup.

The ring hath caught the Lady's eye, she views it close and near,
Then might you hear her shriek aloud, "The Moringer is here!"
Then might you see her start from seat, while tears in torrent fell,
But whether 'twas for joy or woe, the ladies best can tell.
"Yes, here I claim the praise" she said, "to constant matrons due,
Who keep the troth that they have plighted, so steadfastly and true;
For count the term howe'er you will, so that you count aright,
Seven twelvemonths and a day are out when bells toll twelve to-night."

The Bigamy act of 1 Jac. I, c xi, excepted from its penalties those who married a second time when the first husband (or wife) had been beyond seas for seven years—and Tennyson should have referred to this in his poem of "Enoch Arden," where Mrs. Arden waits over ten years for Enoch to come back. Very likely neither Mrs. Arden or Tennyson, himself, knew the law on the subject. Poets should always study law, as Scott did, but if more of them did so, there would be less poetry written.

The Supreme Court of Pennsylvania, in the very recent case of McCausland's estate, 213 Penna. 189, has applied this rule of seven years' absence in an ingenious manner, worthy of observation.

The Act of June 24, 1885, P. L. 155, has gone further. A seven years' wanderer is liable on his return not merely to find his wife married again, but his estate administered as though he were dead. It has been said that this Act went further. For whatever views may be entertained as to the sanctity of the marriage bond all persons are singularly unanimous in maintaining their rights of property. Naturally the operation of this statute met with opposition. In the celebrated case of Cunnius v. Reading School District, 21 Pa. Sup. Court 340; 206 Penna. 469; 198 U. S. 458; its constitutionality was tested in all the judicial laboratories and came out pure gold.

It has been often stated that this rule of the presumption of death from seven years' absence, is of common law

origin. Such is or was the general impression, but see notable matter hereof in the exposition of Professor Thayer in his classical work on Evidence, whereof, as Lord Coke would say, you may disport yourselves for a time. He concludes that while death has always been inferred from long absence, the establishment of the seven year period has been quite modern.

In the short story of *The Two Drovers*, Scott gives us a tragedy from life. Robin having in a fit of vengeful passion, killed his friend, Harry Wakefield, was tried for his murder, and Scott, who happened to be present at the trial, which took place in Carlisle, made a very powerful story of it. He narrates in particular, the Judge's charge, dwelling on the fact that two hours elapsed between the injury received by the prisoner and his fatal retaliation, thus showing the prisoner's deliberate intent. The Highlander condemned to death, acknowledged the justice of his sentence, expressing, with unconscious rhythm the old Lex Talionis—"I give a life for the life I took and what can I do more?"

In *The Talisman* Scott refers to the Assize of Jerusalem, that compendium of feudal law compiled for the government of the Kingdom of Palestine when conquered from the Saracens. As an instance of the attachment of the Frankish invaders to their feudal customs it is also said that Richard I tried to import the Forest laws into Palestine.

Readers of the novel will remember that Conrade of Montserrat stole from its place the banner of England and was detected by the sagacity of Roswal the hound. Richard thereupon charged Montserrat with the offence. "Murders and robbers have been convicted," said he to the King of France, "and suffered death under such evidence, and men have said that the finger of God was in it. In thine own land, royal brother, and upon such an occasion, the matter was tried by a solemn duel betwixt

the dog and the man, as appellant and defendant, in a challenge of murder. The dog was victorious, the man was punished, and the crime was confessed." Scott probably referred to the celebrated case of the Dog of Montargis; but this incident is supposed to have taken place about 1371, so that a reference to it by King Richard is a clear anachronism, though excusable enough in the circumstances. Scott describes in detail, as he loved to do, the judicial combat which ensued between Sir Kenneth, as champion of King Richard, and Conrade of Montserrat, who is defeated and confesses his treason.

The dramatic crisis of the *Fair Maid of Perth* is the ordeal of Bier right for the detection of the murderer of Oliver Proudfute. This ancient method of trial was founded on the belief that at the touch or even approach of the murderer, the body of his victim would bleed afresh. Scott refers to it in his ballad of *Earl Richard*:

"The maiden touched that clay cauld corpse
A drap it never bled,
The ladye laid her hand on him
And soon the ground was red."

This sort of evidence seems to have been recognized in Scottish jurisprudence, at least in the Auchindrane case, on which Scott founded his dramatic poem of *Auchindrane*, the corpse bled at the approach of the murderer's innocent daughter, and the phenomenon naturally attracted attention. As late as 1688 in the High Court of Justiciary at Edinburgh in the Standsfield case, Philip Standsfield, suspected of having murdered his father, touched the body, when the blood instantly gushed forth, which circumstance was included in the libel or indictment against him. The case is quite fully reported in 11 State Trials 1371 and there are some remarks concerning it in Scott's Chronological notes of Scottish affairs from the Diary of Lord Fountainhall. Henry C. Lea examines the subject learnedly in "Superstition and

Force" and even states that in Pennsylvania in 1833, evidence of this kind was allowed to go to the jury. The writer remembers that according to the newspaper reports of a murder a few years ago in New Jersey, the relatives of the deceased made an attempt to have a suspected prisoner touch the body, and Mr. Lea refers to some similar cases. Scott makes a very skillful use of this superstition in the *Fair Maid*, and his description of the ordeal in the Church of St. John is well done. Magdalen Proudfute, the wife of the murdered man, appeals Sir John Ramorny for the murder of her husband by him or one of his household. One by one they pass by the bier and make the sign of the cross on the dead man's breast. When it comes to the turn of Bonthon, the real murderer, he declines the ordeal, and demands as he had a right, the judicial combat, which is accepted by Smith, the widow's champion. The combat is minutely described, and Smith defeats Bonthon, who is condemned to be hung.

Scott utilizes in his story the feud between two powerful clans who, animated by the *perfervidum ingenium Scotorum*, seemed bent on mutual extermination. It was finally agreed to terminate the quarrel in a quasi-judicial manner by a battle between thirty champions on each side, which was actually fought in 1396, before King Robert III, and the whole court of Scotland, and to give greater eclat to the performance, it was reserved for Palm Sunday. They were lusty champions, true to their word, especially when they threatened revenge. Simon Glover remarked of the Highland chief Gilchrist—"saving that he is hasty in homicide, I have nowhere seen a man who walketh a more just and upright path." This combat between the clans Chattan and Kay, is examined at length by George Neilson in his Trial by Combat.

Scott also alludes to the power of the magistrates of Perth to execute, without trial, a person taken red-

handed, according to what was called Jedwood justice—"hang in haste and try at leisure," something like the more peaceful maxim of our day, "Vote first and discuss it afterwards." After this fashion, Earl Douglass hangs the murderers of the Prince, and then takes the verdict of guilty from his jury of Jedwood men.

Scott, in his introduction to the Border Minstrelsy, speaks also of Lydford law, a similar custom in Devonshire:—

"I oft have heard of Lydford Law,
How in the morn they hang and draw,
And sit in judgment after."

So that the Lynch law of our own country has a very ancient and respectable pedigree.

The scene of *Anne of Geierstein*, is laid in Switzerland and France, in the latter part of the fifteenth century, and Scott utilizes for the framework of his story, the Vehmic tribunals, which originated in Westphalia and exercised such a mysterious and potent influence. This secret and oath-bound court assumed criminal jurisdiction of the widest range. Thieves and murderers caught in the act were executed without trial and without delay by Judge Lynch's cousin German. Other offenders, including those who committed any act alleged to offend against honor or religion, or even dared to defy the authority of the Holy Vehme, were arrested, subjected to rigorous and inquisitorial examination, tried and if found guilty, executed by a tribunal, the very members of which were often unknown to one another. In his Introduction, Scott quotes from Palgrave's English Commonwealth an account of the origin and method of this peculiar court which is stated to be a survival from pagan times, and connected with the ancient Saxon religion. The subject had long interested Scott. He made it the subject of his dramas, *The House of Aspen* and *Goetz of Berlichingen* which he had translated from Goethe

in 1799, and thirty years after, he returned to it in *Anne of Geierstein*. Andrew D. White in his recent autobiography says that he was incited to the study of history by reading *Quentin Durward* and *Anne of Geierstein*.

In *The Surgeon's Daughter* Scott introduces Mr. Lawford, the town clerk, a man of sense and humanity, as well as law. Mr. Gray, the surgeon, calls for his aid when the Jewess, Lilia, is about to be arrested for treason. Despite her illness and danger of death, Mr. Lawford admits that the warrant must be executed, "for these evils," he says, "are only contingent, not direct and immediate consequences." He plumes himself not a little on his knowledge of law and of the world, thanked the Lord that they had nothing to do with English practice on this side of the Border, and speaks a word in favor of the Jews—"They are well attached to Government; they hate the Pope, the Devil and the Pretender as much as any honest man among ourselves." To which the Surgeon replied that he could not admire either of those three gentlemen.

In conclusion, the object of this paper has been to show how Scott's legal learning and training influenced his writings; perhaps this object has been accomplished, although of necessity much has been omitted for want of space, as any student of Scott's writings may readily perceive. It is difficult to keep the straight path of our subject, while reading those brilliant novels, so stirring in narrative, so humorous in dialogue, so interesting in historical allusions, so absorbing in their plots. They swarm with life. What characters has Scott created! Caleb Balderston, Jonathan Oldbuck, Peter Peebles, Nicol Jarvie, Dugald Dalgetty, Meg Merrilies, Jeanie Deans, Meg Dods, Diana Vernon, and Rebecca—the female faction is well represented—and there are many more. By the Regiam Majestatem! these are real people, they are living now, and will live forever. To

read Scott is almost enough to make any man willing to be a Scotchman, quite enough to thrill those of us in whose veins runs Scottish blood, and much more than enough to make all of us lawyers feel proud that this Scott was a lawyer. What a wonderful world does this Wizard of the North show us as we gaze into his magic drop of ink! Princes and peasants; cavaliers and covenanters, priests and puritans, lords and ladies gay, monks and maidens on their palfreys white, the moated castles and the dungeons deep, the knights of long ago with "many a crest that is famous in story," and heralds "red and blue and green with all their trumpery." And as the vision fades we can almost hear the soft Scotch melodies, now merry, now mournful, echoing from the Northern hills, while the poet sings:—

"Harp of the North, farewell! The hills grow dark,
On purple peaks a deeper shade descending;
In twilight copse the glow-worm lights her spark,
The deer, half seen, are to the covert wending.
Hark! as my lingering footsteps slow retire,
Some spirit of the Air has waked thy string!
'Tis now a seraph bold, with touch of fire,
'Tis now the brush of Fairy's frolic wing.
Receding now, the dying numbers ring,
Fainter and fainter down the rugged dell,
And now the mountain breezes scarcely bring
A wandering watch note of the distant spell—
And now, 'tis silent all! Enchantress, fare thee well!

John Marshall Gest.



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